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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER HORICE,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A04-0701-CR-67

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0604-FA-65275

October 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Christopher Horice appeals his conviction for Class A felony attempted murder of Shyron Parker. We affirm.

Issues

Horice raises two issues, which we restate as:

- I. whether the trial court's properly excluded evidence regarding Parker's alleged enemies; and
- II. whether the trial court properly admitted evidence regarding a protective order against Horice issued after the shooting.

Facts

Prior to April 9, 2006, Horice and Parker were in a romantic relationship, and Horice lived with Parker and her three children. That day, however, Parker asked Horice to move out of her residence. Horice packed his belongings, and in the early morning hours of April 10, 2006, Parker was shot in the back of the head, "execution style." Tr. p. 244. At 12:58 a.m. Horice called 911 and hung up. At 1:09 a.m., Horice called 911 again and reported that he had gotten in a fight with Parker and as he was leaving he heard a shot fired. Horice requested that the police check on Parker.

When police arrived at Parker's residence she was lying on the floor in a pool of blood. She was hospitalized for over a month but survived the shooting. The police unsuccessfully attempted to contact Horice immediately after the shooting. He finally turned himself in for questioning at 11:00 a.m. on the morning of April 10, 2006—

several hours after Parker was shot. Horice maintained that he heard the shot as he left the apartment, but that he was not the shooter.

On April 12, 2006, the State charged Horice with Class A felony attempted murder and Class B felony aggravated battery. While incarcerated on the pending charges, Horice allegedly admitted to his cellmate that he had shot Parker in the back of the head. Also while Horice was in jail, he and Parker reconciled and discussed getting married. Parker claims she cannot recall who shot her and testified to that at Horice's trial.

The State dismissed the battery charge prior to trial, after which a jury found Horice guilty of attempted murder. He now appeals.

Analysis

I. Evidence of Parker's Alleged Enemies

Horice first argues that he should have been permitted to introduce evidence of Parker's alleged enemies to show that one of them could have shot her. The list includes Parker's husband,¹ three of Parker's former girlfriends, and another woman. The trial court has inherent discretionary power on the admission of evidence, and we review its decisions only for an abuse of that discretion. Vasquez v. State, 868 N.E.2d 473, 476 (Ind. 2007). We will affirm the trial court's decision regarding the admission of evidence if it is sustainable on any basis in the record. Barker v. State, 695 N.E.2d 925, 930 (Ind. 1998).

¹ At the time of trial, Parker was still married to another man, Antoine Brown.

Indiana courts have observed that a defendant may, of course, establish his or her innocence by showing that some other person or persons committed the crime charged. Williams v. State, 600 N.E.2d 962, 965 (Ind. Ct. App. 1992) (citing Bland v. State, 468 N.E.2d 1032, 1035-36 (Ind. 1984)); see also Allen v. State, 813 N.E.2d 349, 361 (Ind. Ct. App. 2004), trans. denied, (observing that a defendant has a constitutional right to present a complete defense). Previously, we have held, “But the mere possibility that some third person did the act is not enough.” Id. “Evidence tending to incriminate another must be competent and confined to substantive facts which create more than a mere suspicion that such other person committed the particular offense in question.” Id.; see also Burdine v. State, 515 N.E.2d 1085, 1094 (Ind. 1987) (“To be admissible, such evidence must do more than cast suspicion or raise a conjectural inference that a third party committed the crime; it must directly connect the third party to the crime charged.”).

However, in Joyner v. State, 678 N.E.2d 386, 389 (Ind. 1997), our supreme court did not apply this standard and concluded that its review was guided by the Indiana Rules of Evidence.² Quoting Indiana Evidence Rule 401, the Joyner court observed,

² The Joyner standard is well settled. See Lashbrook v. State, 762 N.E.2d 756, 758 (Ind. 2002) (“In stark contrast to Joyner, the defendant presents no material evidence that Perez was connected to the crime. The phrase allegedly uttered by Perez that Morton ‘was gonna die’ does not tend to show that Perez committed the murder”); Dickens v. State, 754 N.E.2d 1, 5 (Ind. 2001) (“The trial court was warranted in concluding that these facts do not make it less probable that Dickens committed the crime. Under the Joyner analysis, the evidence was properly kept out until after the State’s case-in-chief.”); Smith v. State, 754 N.E.2d 502, 505 (Ind. 2001) (“In this case, Defendant only sought to present (mostly hearsay) evidence of various threats made by the victim himself; there was absolutely no effort to present any evidence of any behavior by any other person suggesting the existence of another suspect.”); Cook v. State, 734 N.E.2d 563, 568 (Ind. 2000) (“Absent some evidence linking Justice to a third party, Cook’s statement that someone else had a motive to kill Justice amounts to mere speculation.”); McIntyre v.

“Evidence is relevant when it has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” Id. Further, “Evidence which tends to show that someone else committed the crime logically makes it less probable that the defendant committed the crime, and thus meets the definition of relevance in Rule 401.” Id.

Based on the proffered evidence indicating that someone other than the defendant committed the crime, the Joyner court concluded it was error to prevent the defendant from offering the proposed evidence. Id. at 390. Joyner sought to present evidence that Bowens, a married man, was having an affair with the victim, that Bowens worked with the victim, that Bowens had sexual relations with the victim the night before she was last seen alive, that Bowens lied to his wife about his whereabouts that night, that Bowens later told his wife he had gotten into an argument with the victim on the day she was last seen alive, and that Bowens was late to work the morning after the victim disappeared and lied about his tardiness. Id. at 389.

In Joyner, some of the evidence admitted at trial was consistent with the defendant’s theory that Bowens committed the crime. Id. That evidence included expert testimony that Bowens’s hair was a 98%-99% match of a hair that was found inside the plastic bag covering the victim’s head, and the hair did not match the defendant’s hair. Id. Also admitted into evidence was a prior statement contradicting the victim’s

State, 717 N.E.2d 114, 123-24 (Ind. 1999) (“The State urges us to apply the standard set out in Burdine v. State, 515 N.E.2d 1085, 1094 (Ind. 1987). The Burdine test, however, has been superceded by the Indiana Rules of Evidence, effective January 1, 1994.”). Nevertheless, both parties refer to the former standard in their briefs.

brother's trial testimony regarding when the victim was last seen alive and independent testimony that the defendant was seen out by himself and with a friend shortly after he had undisputedly gone out to dinner with the victim the night she went missing. Id.

Here, Parker testified outside of the presence of the jury that she had a violent history with her alleged enemies. Other than Parker's speculative testimony, however, there is no evidence connecting someone other than Horice to the crime. See id at 390.

Regarding her husband, Antoine Brown, Parker testified that in May of 2005, he had pulled out her hair, that in June of 2005, he burned down her patio, and that they had been involved in a custody dispute. When asked if she felt her husband could have shot her, she replied, "I could take it as a chance that he would have." Tr. p. 174. The mere "chance" that Brown could have shot Parker is nothing more than speculation on Parker's part. It does not make it more or less probable that Horice shot Parker especially given the lack of any physical evidence or witness testimony connecting Brown with the shooting. This evidence was not relevant.

Regarding Regina Brooks, one of Parker's former girlfriends, who was in jail at the time of the shooting, Parker testified, "I do got a strong feeling that she could had [sic] something to do with it, she got ten years and she deal [sic] with big people, she [sic] from New York, she [sic] deal with Cubans and stuff." Id. at 180. Although Brooks may have had a motive for shooting Parker, no evidence was admitted linking Brooks to the shooting. Because of Brooks's incarceration at the time of the shooting, this evidence does not make it more or less probable that Horice shot Parker.

In describing her relationship with Tanya Hatchett, another former girlfriend, Parker stated, “I don’t think she was involved” in the shooting even though she had threatened Parker after the shooting. Id. at 184. In her testimony concerning Nicole Henrick, a former girlfriend, Parker said that Henrick was not a threat to her physical safety at the time of the shooting. Because Parker testified that neither Hatchett nor Henrick posed a threat at the time of the shooting, we cannot conclude that Parker’s testimony regarding their relationships with her is relevant. Further, in her testimony regarding Senora Flagg, Parker testified that she did not know if Flagg could have been involved in the shooting. This evidence does not make it more or less probable that Horice shot Parker; therefore, it, too, is not relevant.

None of Parker’s testimony regarding her alleged enemies was relevant to whether Horice shot her. The trial court did not abuse its discretion in excluding it.

II. No Contact Order

Horice also argues that the trial court improperly admitted into evidence a copy of the no contact order issued on April 13, 2006, after the shooting. The order prevented Horice from having contact with Parker or her children. Despite the order, Horice had contact with Parker via letters and telephone calls while he was in jail awaiting trial.

When the State moved to admit a copy of the no contact order, Horice objected on relevancy grounds. Without giving the State an opportunity to respond, the trial court ruled that the no contact order was admissible stating, “I disagree with you I think it shows consciousness of guilt and that he violated this Court’s no-contact order and therefore I find it’s relevant and relevance outweighs any prejudicial effect.” Tr. p. 213.

Horice contends that the no contact order was highly prejudicial and was admitted “to demonstrate that the State and the Court believed [Horice] to be of bad character and to have the propensity to have committed the charged attempted murder.” Appellant’s Reply Br. p. 2. The State contends that the no contact order was admitted to show the jury the lengths Horice would go to manipulate Parker and to demonstrate his knowledge of his guilt.

Indiana Evidence Rule 404(b) provides, “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”

This rule prevents the State from punishing people for their character, and evidence of extrinsic offenses poses the danger that the jury will convict the defendant because his ‘general character’ is bad or . . . he has a tendency to commit other crimes. To decide whether character evidence is admissible under Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person’s propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Ind. Evidence Rule 403.

Bassett v. State, 795 N.E.2d 1050, 1053 (Ind. 2003) (ellipsis in original) (citations and quotations omitted).

Citing to cases holding that a protective order is admissible to show motive, intent, and history of a troubled relationship, the State argues that the no contact order was properly admitted into evidence. See Hatcher v. State, 735 N.E.2d 1155, 1159 (Ind.

2000) (citing Fox v. State, 560 N.E.2d 648, 652 (Ind. 1990)). Here, however, the no contact order was issued after the shooting. Logically, it cannot be relevant to show motive, intent, or a history of a troubled relationship. In fact, considering the State's argument, we can only infer that the no contact order and the evidence that he violated the no contact order was admitted to show that Horice was a "bad guy" who had manipulated Parker. Also, the admission of the no contact order, which specifically referred to the attempted murder charge, may have been perceived by the jury as a judicial finding that Horice shot Parker. This evidence was not admissible as character evidence, and the trial court abused its discretion by admitting the no contact order into evidence.

We must also determine whether this error affected Horice's substantial rights. "[E]rrors in the admission or exclusion of evidence are to be disregarded as harmless unless the errors affect the substantial rights of the party." Wilson v. State, 770 N.E.2d 799, 802 (Ind. 2002). "To determine whether an error in the introduction of evidence affected a defendant's substantial rights, this Court considers the probable impact of that evidence upon the jury." Id.

The evidence that Horice owned a gun, that Parker had asked him to move out of her apartment earlier that day, that he had admittedly gotten into an argument with Parker immediately prior to the shooting, that he called 911 and reported hearing gunshots from Parker's apartment, that he did not cooperate with police immediately after the shooting, that there was no evidence of forced entry, and that he confessed to his cellmate is overwhelming evidence of his guilt. We conclude the admission of the no contact order,

although erroneous, did not affect Horice's substantial rights. This error does not amount to reversible error.

Conclusion

The trial court was within its discretion to exclude evidence of Parker's alleged enemies because it was not relevant. Although the trial court abused its discretion in admitting the no contact order, this error did not affect Horice's substantial rights. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.